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Amicus Briefs

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Chapter 29

AMICUS BRIEFS

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An amicus curiae ("friend of the court") brief is one voluntarily submitted by counsel not a party to an active appeal, seeking to call the court's attention to interests or arguments which might otherwise escape its consideration.[1] At common law such assistance was delivered orally in court, and generally welcomed by the judge as free and relevant research.[2] In recent years appellate briefs filed by such friends have become increasingly prevalent, and their role in the litigation process has changed significantly — having evolved from an inanimate and neutral source of information to an integral part of the judicial process. Some modern courts have even allowed amici to act as involved parties to the litigation at hand — engaging in oral argument, introducing evidence, examining witnesses and conducting discovery.[3] Consequently, amicus curiae intervention today is more closely managed and is subject to increasingly detailed rules and restrictions.[4]

I. CONSIDERING PARTICIPATION AS AN AMICUS

Amicus curiae intervention should be thought of as an alternative to the more formal methods of class action — compulsory joinder and intervention.[5] The amicus brief provides an opportunity to apprise the court of broad-based legal, social and economic implications of a judicial decision,[6]

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1. *Black's Law Dictionary* offers two phonetic pronunciations for "amicus," one accenting the first syllable ("a'micus"), the other the second ("ami'cus"); both are correct. *See also* 4 AM. JUR. 2D *Amicus Curiae* § 1 (1962).
2. Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy,* 72 YALE L.J. 694, 695 (1963).
3. Lowman, *The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave*?, 41 AM. U. L. REV. 1243, 1246 (1992).
4. Recent commentary has described some courts' increasing skepticism towards amicus briefing. *See, e.g.,* Paul M. Smith, *The Sometimes Troubled Relationship Between Courts and Their Friends*, 24 LITIG. 24 (1998); Stephanie Rae Williams, *Filing Amicus Curiae Briefs: A "Friend of the Court" Should Be A Friend Indeed,* A.B.A. TORT & INS. PRAC. SEC. TIPS COMMITTEE NEWS, Spring 1998, at 18. *See also* Reagan Wm. Simpson, *How to be A Good Friend to the Court: Strategic Use of Amicus Briefs*, 28 SPG BRIEF 38 (1999).
5. *Id.*
6. Parlee, *A Primer on Amicus Curiae Briefs,* 62 WIS. L. REV. 14 (1989).

or to point out how it may have unintended consequences for a group not directly before the court.[7]

Amici may be able to draw on their own experience to identify practical consequences of the decision below that are not apparent from the record[8] and to make arguments that have been overlooked by the parties.[9] Amicus briefs have also been used to supplement or take the place of expert witnesses or communicate a body of research findings.[10] In addition, a good amicus curiae can clarify issues confused by a poorly written principal brief.[11]

II. COURT RULES

"Most cases before this Court," Justice Hugo Black once remarked, "involve matters that affect far more people than the immediate record parties."[12] One need look no further than the steady and dramatic increase of *amicus curiae* (friend of the court) briefs filed before the Supreme Court in recent years to verify Justice Black's observation.

The Supreme Court's rule specifically addressing the amicus curiae brief is instructive:

> An amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An amicus brief which does not serve this purpose burdens this Court, and its filing is not favored.[13]

Thus an amicus brief may be disallowed by a court when a party is not represented competently (or is not represented at all); when the amicus has an interest in some other case that may entitle the amicus to intervene and become a party in the present case; or when the amicus has unique infor-

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7. Rains, *Fair Weather Friend of the Court: On Writing an Amicus Brief,* 26 TRIAL 57, 58 (1990).
8. Cole, *Petitioning for Certiorari in the Big Case,* 12 No. 3 LITIGATION 33, 36 (ABA 1986).
9. Friedman, *Winning on Appeal,* 9 No. 3 LITIGATION 15, 18 (ABA 1983).
10. Roesch, et al., *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 LAW & HUM. BEHAV. 1, 4 (1991). Such an amicus brief was filed jointly by the American Psychology-Law Society and the American Psychiatric Association in *Maryland v. Craig*, 497 U.S. 836 (1990).
11. Friedman, *supra* note 8.
12. Quoted by Mary-Christine Sungaila, *Effective Amicus Practice Before the United States Supreme Court: A Case Study*, 8 S. CAL. REV. L. & WOMEN'S STUD. 187, 188 (1999).
13. U.S. S. Ct. R. 37, 28 U.S.C. Appendix.

mation or perspective that can assist the court beyond the help that lawyers for the parties are able to provide.[14]

The Federal Rules of Appellate Procedure provide that an amicus brief may be filed with the consent of all parties, or by leave of the court, or at its request.[15] (Such consent is not needed for a brief presented by the United States or a state, territory, or commonwealth.) The motion for leave must identify the interest of the applicant and state why the amicus brief is desirable. Generally, the brief is to be filed within the same time limits required of the party it supports. Participation in oral argument is granted only under extraordinary circumstances.

Amici also appear frequently at the state level. In Maryland, the rule for filing of an amicus brief is derived from the federal rules, with some notable differences: An amicus brief may only be filed with permission of the court, and the amici must state all issues intended to be raised, in addition to the reason why the amicus participation is desirable.[16] Like the federal rule, the style, content, and time for filing of the amicus brief is no different than those for the brief whose position is being supported,[17] and amici participate in oral argument only under extraordinary circumstances.

As the rules suggest, amicus curiae intervention is not a right, but a courtesy granted at the court's discretion (or the parties' approval). The degree to which the amicus curiae is interested in the outcome of the case thus plays a role in whether or not leave to file is granted. Again, the extent to which the amicus provides a new or different perspective as to the issues raised by the parties (as well as the competence of the parties' representation) are the primary factors considered by the court when determining whether it will entertain assistance.

Since amici curiae are not direct parties to the case, they may not initiate appeals of lower-court rulings or raise additional issues, and are generally limited to discussing questions of law. Therefore, denial of permission to intervene as an amicus may not be appealed.[18] (On the other

14. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).
15. Fed. R. App. P. 29, 28 U.S.C. Appendix.
16. Md. Rule 8-511.
17. Except for the color of the covers. Md. Rule 8-503(c) states that an amicus brief submitted to either the Court of Special Appeals or the Court of Appeals must have gray covers.
18. An amicus curiae may move for dismissal under certain conditions, such as lack of jurisdiction, a collusive or fictitious action, or the death of a party. *See* 4 AM. JUR. 2D, *Amicus Curiae* § 5 (1962).

hand, since the amicus is not a party to the case, it is not bound by the judgment rendered.)

III. WRITING THE AMICUS CURIAE BRIEF

Preparing and writing an amicus curiae brief is little different than the approach taken in submitting a primary brief. The principles of effective brief writing are equally applicable.[19] Although many amicus briefs never make it past the appellate judge's clerk,[20] a sloppy or disorganized brief will reduce the probability that future filings will be allowed.[21]

Once leave to file is granted, the first order of business should be to meet with the lead counsel of the party whose position the amicus is supporting. The process should be thought of as a coordinated team effort; if there are other amici, they should be asked to participate.

The amicus brief should not be a warmed-up version of arguments already made.[22] A good amicus curiae will add something to the case, perhaps "better research, more cogent analysis or a more convincing demonstration of the impact on the public at large."[23] Emphasis should be placed on assisting the court by way of the "special perspective" of the amicus.[24]

Because an amicus curiae is representing an interest and is not a party, it may be necessary for it to include additional facts in its brief which are not in the record. This information is important because those facts may not be available to the parties; if so, the amicus may be viewed by the court as being especially helpful in contributing to the right decision.[25] In addition to a factual analysis, the practical side of the case should be evaluated as well.[26]

Finally, while it is more acceptable today for an amicus to act like an advocate, it is still generally agreed that an amicus brief will be most effective if it is not obviously compelled by self-interest.[27]

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19. *See* Chapter 27: A Methodology of Brief Writing. *See also* E. Re, BRIEF WRITING AND ORAL ARGUMENT 89 (5th ed. 1983).
20. Rains, *supra* note 7, at 57 (quoting *Supreme Court Practice).*
21. Parlee, *supra* note 6.
22. *G. Peck*, WRITING PERSUASIVE BRIEFS 167 (1984).
23. Parlee, *supra* note 6, at 16.
24. *Id.* at 15.
25. Friedman, *supra* note 9, at 18.
26. Peck, *supra* note 22.
27. Cole, *supra* note 8, at 36.

IV. SUMMARY AND CONCLUSION

Amicus curiae participation has existed for many years, but its role has evolved. Rather than being mere "friends" on the sideline, amici have become more integral (and in some cases, active) parts of the appellate process. Because the amicus brief can be an important tool for today's advocate, its preparation and writing should be approached with the same intensity as with a brief submitted by a party.